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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ARTHUR SANCHEZ,

Defendant and Appellant.

D058817

(Super. Ct. No. JCF25032)

APPEAL from a judgment of the Superior Court of Imperial County, Matias R. Contreras, Judge. (Retired judge of the San Diego Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.) Affirmed as to conviction; reversed as to sentence and remanded for resentencing.

Arthur Sanchez appeals from a judgment convicting him of battery by a prisoner on a nonprisoner. He raises numerous contentions to support his claim that the judgment must be reversed. He contends the jury failed to set aside its prior deliberations when an alternate juror was substituted into the jury. He also asserts the trial court erred by denying his request that the case be dismissed due to misconduct by a bailiff; permitting up to seven security officers in the courtroom; excluding evidence that he was nearing his

parole date at the time of the charged battery; and admitting evidence that correctional officers found a cell phone in his cell after the battery incident. He further argues that during closing argument the prosecutor argued facts that were not in evidence, and that the cumulative effect of error denied him a fair trial. We find no error, except for the exclusion of the evidence concerning the nearness of his parole date. We conclude the latter error was not prejudicial.

Additionally, as requested by defendant, we have independently reviewed the officer personnel records that were reviewed by the trial court during an in camera *Pitchess*¹ hearing. We find no abuse of discretion. Finally, the Attorney General concedes, and we agree, that at sentencing the court erred in imposing a five-year prior serious felony enhancement.

Accordingly, we affirm the judgment as to the conviction, reverse the judgment as to the sentence, and remand the case for resentencing.

FACTUAL AND PROCEDURAL BACKGROUND

The charged battery incident occurred when defendant assaulted correctional officer Frank Soto while Soto was at defendant's cell to conduct a cell search.

On September 4, 2009, Officer Soto and another correctional officer (Larry Thomas) were conducting random cell searches. The cells have a solid metal door with a long, narrow glass window. To open a locked cell door, an officer in a control booth "pop[s]" the door open, and then an officer on the floor manually slides the door open on

¹ *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

a rail. When the correctional officers approached defendant's cell, Officer Soto looked through the cell window and saw defendant and his cellmate (Carlos Aguilar) standing in the middle of the cell facing each other. Officer Soto signaled to the control booth officer to open the door. As the door clicked open and Officer Soto started sliding it open, defendant ran towards the toilet located by the cell door, lowered his boxer shorts, and sat down. Aguilar went towards the back of the cell and sat on the lower bunk; it appeared as if he was fumbling with something and trying to conceal it.

Officers Soto and Thomas remained outside the cell by the door, with the door partially open and held in place by Officer Thomas. Officer Soto told the two inmates to exit the cell so he could conduct a cell search. Defendant responded that he had diarrhea and that he was not going to exit the cell. Officer Soto then ordered Aguilar to leave the cell. Defendant told Aguilar not to step out, and Aguilar did not comply with the officer's order. At this point Officer Soto radioed for yard staff to come to the building to provide assistance. Defendant stated to Aguilar, " 'hide the shit, homey, hide the shit.' " Defendant then jumped up from the toilet; lunged towards the cell door; extended his arm out the door; and forcefully hit Officer Soto in the upper arm.

When he was hit by defendant, Officer Soto stepped back from the door, pulled out his pepper spray, and ordered the two inmates to "get down." Defendant and Aguilar did not comply with the order. Defendant was attempting to open the door further and come out the door, while Officer Thomas was trying to close the door. Officer Soto sprayed towards defendant's facial area; the spray hit the door and some of it sprayed back on Officers Soto and Thomas. Defendant continued to try to squeeze his body out

the cell door as Officer Thomas was struggling with the door. Defendant managed to get his head, shoulder, and arm outside the cell door, with his head ducked down. Officer Thomas was trying to hold the door and spray defendant so that defendant would back up inside the cell and the door could be closed. Officer Thomas was able to "get underneath" and spray directly into defendant's face. Defendant then released the door and went back inside the cell.

Officer Thomas closed the door and secured the inmates within the cell. Officer Soto looked through the cell door window and saw defendant "hunched over the toilet" and attempting to flush an item down the toilet. Standing outside the cell, Officer Soto turned off the water supply to defendant's cell.

When backup staff arrived, defendant and Aguilar were removed from the cell. Nothing was found in the toilet. Upon further search of the cell, a correctional officer found a cell phone and cell phone charger hidden in a deck of cards on an upper shelf. Inmates are prohibited from possessing cell phones; the phones are considered contraband and possession of the item is subject to disciplinary action.

Defense

Testifying on his own behalf, defendant stated that when the officers arrived at his cell he had diarrhea and he was sitting on the toilet. He told Officer Soto that he would not step out because of his diarrhea. Officer Soto responded that the only reason defendant sat down was because Soto was coming towards the door. Officer Soto then asked Aguilar to step out, and defendant asked Aguilar why he would want to step out when defendant was using the toilet. Defendant acknowledged that when Officer Soto

called for backup on his radio, defendant stated to Aguilar, "'hide the shit,'" by which he meant that Aguilar should hide the cell phone.

After this occurred, defendant reached over and tried to close the cell door so he could have privacy while using the toilet, but Officer Soto was holding the door with his hand. Feeling that Officer Soto was "overstepping his grounds," defendant stood up and forcefully tried to close the door by pulling on a door panel inside the cell. Officer Soto put his foot inside the door to stop it from closing, and then sprayed pepper spray into the cell. The spray hit defendant; defendant backed up; he was hit by spray again; and then the door was shut. Defendant testified he was only trying to close the door; he did not lunge or reach out of the cell; and he did not punch Officer Soto.

To support defendant's version of what occurred, the defense presented testimony from defendant's cellmate Aguilar and the officer in the control booth. Aguilar testified that when the officers came to the cell, he was sitting on the lower bunk eating a sandwich and watching television, while defendant was using the toilet. Officer Soto told them to step out of the cell, but defendant said to give him some privacy because he had diarrhea and was still using the toilet. When the officers told Aguilar to come out of the cell, defendant told him not to step out. Aguilar did not comply with the officers' order but was waiting for defendant to finish using the toilet. The officers then sprayed them with pepper spray. Aguilar testified he did not see defendant stand up, lunge out of the cell, or hit an officer.²

² Aguilar did not recall defendant saying "'hide the shit.' "

The control booth officer (Robert Santiago) observed the incident from about 80 feet away. Officer Santiago testified that when he hit the button to open the cell door and the officers grabbed the door, there was a struggle over the door. Officer Santiago saw the door moving back and forth and it looked as if someone was trying to close the door while someone else was trying to open it. Officer Soto was holding the door with his hand and his foot was in the door to prevent it from closing. Officer Santiago saw Officer Soto radio for backup, hit his alarm, pull out his pepper spray, and spray into the cell. After Officer Soto sprayed the pepper spray, the cell door was immediately closed.

Officer Santiago did not see defendant come out of the cell and did not see any hands or arm outside the cell. On cross-examination, he testified that his view of the open gap in the door was blocked by Officer Soto's body and was obscured by the lack of lighting inside the cell. He acknowledged that it was possible that an arm came out of the cell and he did not see it. However, he believed he would have been able to see if someone lunged out of the cell and hit someone. He also could not tell whether Officer Thomas was trying to open or close the door as he helped Officer Soto struggle with the door.

Jury Verdict and Sentence

The jury convicted defendant of battery by a prisoner on a nonprisoner. (Pen. Code, § 4501.5.)³ In a bifurcated proceeding, the jury found he had suffered three strike prior convictions. At sentencing, the court struck two of the strike priors. The court

³ Subsequent statutory references are to the Penal Code.

sentenced defendant to 11 years in prison, consisting of six years (double the three-year midterm based on the strike prior), and a five-year enhancement for a serious felony prior conviction.⁴

DISCUSSION

I. *Jury Deliberations with Alternate Juror*

Defendant argues his jury trial rights were violated based on the manner in which the jury deliberated after an alternate juror was substituted for one of the original jurors. He contends when the alternate juror joined the jury, the original 11 jurors failed to disregard their prior deliberations and in effect persuaded or pressured the alternate juror to agree with their preliminary determinations.

Background

The original 12 jurors began their deliberations at 3:54 p.m. on September 15, 2010, and deliberated for about one-half hour, until court was recessed for the day. During these deliberations, they submitted a note asking about a lesser included offense,

⁴ Apparently thinking defendant had incurred only two (not three) strike priors, at one point during sentencing the court stated that it was dismissing one strike prior. However, the court explicitly stated it wanted to remove defendant from the mandatory 25-years-to-life sentence of the Three Strikes law, which required the court to strike two of the three strike priors. (See § 667, subd. (e)(2)(A); *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 505-506.) To effectuate the court's clear intent, we construe the court's order as striking two strike priors.

and the court responded to the note.⁵ The next morning (September 16), the jury deliberated for about one hour and 40 minutes, and then it was excused until the afternoon. During these morning deliberations, the jurors asked for the pictures used in the case and the jury instructions. At 11:20 a.m., one of the jurors was excused from further jury service because she had become ill. An alternate juror was contacted and told to report to court at 1:30 p.m. that day.⁶

Sometime before 1:30 p.m., the alternate juror apparently arrived at court and, unbeknownst to the court, the alternate joined the jury in the jury room. The jury had not been instructed that it was required to start its deliberations over with the alternate juror. Then, "right before 1:30" the jury told the court it had reached a verdict. When apprised of the situation, the court did not accept the verdict. Instead, at 2:04 p.m., the court convened the reconstituted jury and the parties in open court, and then instructed the jury of its duty to deliberate anew with the alternate juror. The court stated to the jury:

"Listen carefully. The alternate juror must participate fully in the deliberations that lead to any verdict. The People and defendant have a

⁵ The jurors started deliberating at 3:54 p.m. on September 15, and they were instructed to deliberate until 4:30 p.m. At 4:05 p.m. the jury submitted a note asking for clarification of simple battery as a lesser included offense of count 1 battery by a confined person. At 4:12 p.m., the jury convened in open court, and the court responded to the question. At 4:18 p.m. the jury resumed its deliberations. The record does not indicate the precise time the jury stopped deliberating for the day.

⁶ The deliberations on September 16 started at 9:05 a.m. At 9:35 a.m., the jury submitted the note asking for pictures and instructions; these materials were provided at 9:45 a.m. At 10:45 a.m., the jury submitted a note requesting a 15-minute break because a juror felt poorly from medication. At 11:20 a.m., the ill juror was relieved from duty, and the remaining jurors were excused for the morning and directed to return at 1:30 p.m. The court clerk was directed to contact an alternate juror.

right to a verdict reached only after full participation of the jurors whose votes determine that verdict. [¶] This right will only be assured if you begin your deliberations again from the beginning. Therefore you must set aside and disregard all past deliberations and begin your deliberations all over again, including the alternate juror in the deliberations. Each of you must disregard the earlier deliberations and decide this case as if those earlier deliberations had not taken place." (See CALCRIM No. 3575.)

At the conclusion of the instruction, the court again emphasized that the jury should start deliberating from the beginning, stating: "Now, please return to the jury room and start your deliberations from the beginning including the alternate juror." (See *ibid.*)

After receiving the redeliberation instructions, the jury was excused for deliberation at 2:07 p.m. It appears the jury deliberated for about one-half hour, indicating to the court that it had reached a verdict at about 2:40 p.m. When informed a verdict had been reached, the court told counsel (outside the presence of the jury) about the alternate juror's premature entry into the jury room without the jury having been instructed on its duty to start its deliberations anew. The court stated that it wanted to separately question the alternate juror and the foreperson to see if the jury followed the instruction to start again from the beginning and if the alternate was allowed to fully deliberate. The court stated that counsel could also ask questions, and if either counsel felt the alternate juror was not able to fully participate in the deliberations, then she would be excused and another alternate would be brought in to deliberate.

The court brought the alternate juror into chambers and expressed its concern that before the jury was instructed to start its deliberations anew, she had started talking about the case with the other jurors and then the jury reached a verdict. The court cited its instruction about "starting from square one and going from there, discussing the case

fully and then arriving at a verdict," and asked the juror if she was satisfied that this had occurred. The following colloquy then occurred:

"ALTERNATE JUROR []: We went back but we pretty much had actually done that because I'm not like the real quiet type. I went in, said who said what, and they kind of briefed and went through all of it before I even said anything."

"THE COURT: So you basically started from scratch the first time. And when you went the second time —"

"ALTERNATE JUROR []: The only thing I did was said, 'Did you guys leave anything out?' And they said, 'Well, we went over the counts.' I guess there was discrepancies or they weren't understanding Count 1 Count 2. [¶] . . . [¶] . . . They took paper out and I read through what they did. That was the only thing they hadn't really covered."

"THE COURT: So you're satisfied that you were an important part of the jury verdict?"

"ALTERNATE JUROR []: I made them tell me everything."

"THE COURT: They included you in the deliberations; wasn't one of those things where 11 of us say X, Y, Z, what did you say?"

"ALTERNATE JUROR []: They could say whatever and wouldn't change my mind."

"THE COURT: Though you discussed the evidence —"

"ALTERNATE JUROR []: Fully."

After this inquiry by the court, counsel for both parties stated they had no questions. When the foreman was brought into the chambers, the court asked if he thought the alternate was allowed to fully deliberate in the verdict. The following exchange occurred:

"JURY FOREMAN: She was very sure of herself and she did — she made her wishes known immediately. And she was able — and then we took time to let her look at it and she says nothing is going to change at this point."

"THE COURT: When you say you looked at it, discussed —"

"JUR[Y] FOREMAN: We discussed the instruction — she had the instructions. We went over the instructions and she looked at the pictures again. Discussed the evidence for her feelings."

Both counsel again declined to ask any questions. Defense counsel told the court that it appeared the alternate juror was allowed to fully deliberate, and all agreed the court should receive the verdict.

Analysis

To ensure that each of the 12 jurors reaching the verdict has fully participated in the deliberations, when an alternate juror replaces a juror after the commencement of deliberations, the court must instruct the jury to disregard its past deliberations and begin deliberating anew. (*People v. Collins* (1976) 17 Cal.3d 687, 694.) As explained in *Collins*, the jury must set aside its prior deliberations and start from the beginning because the 12 jurors must "reach their consensus through deliberations which are the common experience of all of them. It is not enough that 12 jurors reach a unanimous verdict if 1 juror has not had the benefit of the deliberations of the other 11.

Deliberations provide the jury with the opportunity to review the evidence in light of the perception and memory of each member. Equally important in shaping a member's viewpoint are the personal reactions and interactions as any individual juror attempts to persuade others to accept his or her viewpoint. . . . [A] defendant may not be convicted except by 12 jurors who have heard all the evidence and argument and who together have deliberated to unanimity." (*Id.* at p. 693.)

Although the case before us does not involve instructional error, it is helpful to review case authority addressing how to properly instruct a reconstituted jury. The jury should not merely be told to start its deliberations over, but should also be told to disregard its prior deliberations so that the opinions of the *discharged juror* are not used

by the jury in arriving at a verdict. (*People v. Martinez* (1984) 159 Cal.App.3d 661, 665.) Similarly, the jury should not be instructed in a manner that implies the alternate juror should be brought " 'up to speed' on what matters have already been discussed and possibly decided." (*People v. Odle* (1988) 45 Cal.3d 386, 405 [jury improperly told to start " 'from scratch so that [alternate juror] has full benefit of everything that has gone on between the jury up to the present time' "].) However, a court does not err if it tells the original jurors to start their deliberations " 'from scratch' " so that the alternate juror " 'has the benefit of your thinking as well as give him an opportunity for his input also.' " (*People v. Proctor* (1992) 4 Cal.4th 499, 536.) *Proctor* explains: "By providing this [start from scratch] directive in the context of advising the jurors to give the alternate the benefit of the other jurors' thoughts, as well as to give the jurors the benefit of the alternate's input, the court . . . emphasized that deliberations were to begin anew with the full participation of the alternate. Furthermore, the court did not suggest that the jury might not have to reconsider any matter already considered or decided." (*Id.* at p. 537.)

Here, the alternate juror's responses to the court indicate that when she asked "who said what" the original jurors presented their views to her; she was not the "quiet type" and presented her own views; and they fully discussed the evidence. The jury foreman likewise confirmed that they discussed the evidence and the alternate juror's opinions. These statements reflect full deliberations by all jurors on the reconstituted panel and do not suggest the 11 original jurors pressured or persuaded the alternate juror to succumb to matters already resolved.

Defendant argues that even if the alternate juror fully participated in the deliberations, her statements to the court show that the original jurors failed to disregard their prior deliberations because they provided her a summary (including a written one) of their prior deliberations. The alternate juror told the court that the other jurors briefed her about "who said what"; they showed her a paper and she read through "what they did"; and she "made them tell [her] everything." The mere fact that the 11 original jurors may have summarized their previously-expressed views to the alternate juror does not show that they failed to follow the court's instruction to disregard the prior deliberations. Error would arise if the views of the *discharged juror* were incorporated into this summary, or if the original jurors presented their views as matters *already resolved*. (See *People v. Odle, supra*, 45 Cal.3d at p. 405; *People v. Martinez, supra*, 159 Cal.App.3d at p. 665.) The record does not show this occurred. Although the views summarized by the original jurors for the benefit of the alternate juror may have been the same as those expressed during the prior deliberations, this did not mean the original jurors were relying on their prior deliberations rather than presenting these views anew for consideration by, and response from, the alternate juror. (*People v. Proctor, supra*, 4 Cal.4th at p. 537 [court did not err in telling original jurors to give alternate juror "the benefit of [their] thoughts" with input from the alternate].) Based on the statements reflecting that the evidence was fully discussed and the alternate juror's opinions considered, the record supports that the prior deliberations were set aside.

To support his claim that the original jurors did not disregard their prior deliberations, defendant cites the fact that the jury reached a verdict only minutes after

the alternate juror improperly entered the jury room before receiving the redeliberation instructions from the court. Any concern for the failure to redeliberate at this juncture is dispelled by the court's refusal to accept the verdict, its instructions to the jury on its redeliberation duty, the ensuing deliberations by the jury, and the court's examination of the alternate juror and foreman prior to acceptance of the verdict.

Defendant also argues that the short length of the deliberations by the reconstituted jury (about 30 minutes), as compared to the longer period of deliberation by the original jury (about two hours), reflects that the 11 original jurors likely relied on their prior deliberations when reaching the verdict. Again, the jurors remaining from the original panel could permissibly present their views to the alternate juror, even if they had expressed these same views during prior deliberations. The fact that the reconstituted jury spent less time deliberating than the original jury does not alone show a failure to deliberate anew. Notably, this is *not* a case where the trial court failed to properly *instruct* the jury on its duty to deliberate anew, and the shortness of deliberations by the reconstituted jury could suggest that the jury may not have understood this duty. (See, e.g., *People v. Renteria* (2001) 93 Cal.App.4th 552, 557, 560-561.)

The jurors were properly instructed to start their deliberations over and to set aside the earlier deliberations; after receiving this instruction they returned to the jury room to recommence their deliberations; the court questioned the alternate juror and the foreman to ensure deliberations were properly conducted; and all parties were satisfied that the reconstituted jury had engaged in proper deliberations.

Absent a contrary showing in the record, we assume the jurors followed the court's instruction to disregard their prior deliberations and to start their deliberations over. (See *People v. Gray* (2005) 37 Cal.4th 168, 231.) The record does not show the jurors failed to follow the court's directive.

II. Denial of Dismissal Motion Based on Bailiff's Conduct

As we shall detail below, during jury selection the trial court granted defendant's motion for a mistrial based on a bailiff's confiscation of two documents from defendant, one of which apparently involved an attorney-client communication. At the time of the second trial, defendant moved to dismiss the case based on the bailiff's conduct. Alternatively, defendant requested that the bailiff be excluded from the proceedings. The trial court denied these requests.

Defendant argues the bailiff's misconduct created a chilling effect on his ability to freely communicate with his counsel during trial. He asserts the case should either be dismissed with prejudice to deter this type of flagrant misconduct, or he should be granted a new trial without the presence of the bailiff who engaged in the misconduct.

Background

During a break in voir dire of prospective jurors, defense counsel moved for a mistrial based on a bailiff's confiscation of two documents from defendant during the voir dire proceedings. The bailiff took the documents from defendant while defense counsel was questioning the prospective jurors, apparently because the bailiff was concerned that

defendant was writing down juror addresses.⁷ After looking at the documents, the bailiff returned them to defendant.⁸

In support of the mistrial motion, defense counsel argued the fairness of the jury panel was compromised by the bailiff's conduct. To evaluate the mistrial motion, the trial court asked to see the documents that had been reviewed by the bailiff. The two documents were (1) a printed jury sheet marked "confidential" that had been provided to counsel, and (2) a yellow sheet with defendant's handwriting. The court checked the jury sheet document and ascertained there were no addresses. The court also "glanced" at the sheet in defendant's handwriting, saw there were no addresses on it, and otherwise did not

⁷ A juror had apparently stated her address during voir dire.

⁸ Defense counsel told the court: "[The bailiff] was reprimanding my client, yelling at him, grabbing papers from him; and then pointing his finger at me and telling me what I can and cannot do. [¶] I guess he thought my client was writing down addresses [of] the jurors, and he doesn't think my client should be allowed to . . . have access to things that I had already told my client he could look at, and we had an understanding at this table. He then took the notes that my client was writing to me, he read those notes, gave them back. I looked at the jurors and they were all staring at the incident." The prosecutor told the court: "I didn't hear any yelling in the courtroom. I believe the bailiff whispered something."

ascertain or describe the contents of this document.⁹ Satisfied that the documents did not raise a security concern, the court returned the documents to defense counsel.

The trial court granted the mistrial motion, stating that although the bailiff may have been legitimately concerned about protecting jurors' addresses, attorney-client communications are sacrosanct and entitled to protection. The court elaborated that although it was "loathe" to grant the mistrial motion and it was not doing so "lightly," it was sufficiently concerned about protecting the attorney-client privilege that it was going to grant the motion. Accordingly, the court dismissed the prospective jurors and started the proceedings anew with a new panel of jurors.

At the close of the prosecution's case-in-chief, defense counsel made a motion to dismiss the case based on the bailiff's previous misconduct.¹⁰ Defense counsel argued the bailiff's conduct had caused a breakdown in attorney-client communications, and the only effective remedy was dismissal. Defense counsel stated that defendant felt more

⁹ During the subsequent arguments on the dismissal motion, defense counsel contended the court's review of the documents during the mistrial proceedings had revealed to the prosecution part of the defense trial strategy. The prosecutor retorted that this was "absurd" and he had not been given any information about defense strategy. Reviewing what had occurred during the mistrial proceedings, the trial court stated the contents of the attorney-client communications had not been discussed in court, and it did not "really know or recall" what was on the document in defendant's handwriting. Consistent with the court's recollection, there is nothing in the reporter's transcript reflecting that the court disclosed the contents of what defendant wrote when it was considering the defense motions.

¹⁰ After the mistrial and before commencement of the second trial, defense counsel made a motion to continue the case to permit the filing of a dismissal motion. The court denied the continuance, but permitted defense counsel to make a dismissal motion at the close of the prosecution's case.

comfortable communicating with counsel in the courtroom than in the monitored prison environment, and defendant's communications to her during the course of trial were "the most sacred form of communication between a client and his attorney" and essential to her effective representation. Counsel asserted that the bailiff's interception of the attorney-client communication had created a "chilling effect" on defendant's ability to communicate with her because he no longer felt comfortable writing notes or speaking to her during trial in the same way as he had before the incident.

The trial court denied the dismissal motion. The court explained that it granted the mistrial motion because the prospective jurors had been exposed to an appearance of a violation of the attorney-client privilege; the new panel of jurors had not been exposed to the bailiff's conduct; and "what little" the court saw was not "something that [the court] thought really violated the attorney/client privilege."

As an alternate remedy to dismissal of the case, defense counsel requested that the bailiff who had confiscated the documents be excluded from being a bailiff in the case. The court denied the request. The court stated it had talked to the bailiff about his conduct and the available alternatives and proper way to respond to security concerns, and the bailiff had concurred with the court about how to appropriately handle any such concerns. The court also noted the bailiff was not working as a bailiff at this point in the trial; he may be in the courtroom "on occasion"; this was not a problem "as long as he's not actually serving as the bailiff"; and it was up to the sheriff to decide how to staff the court. The court's minutes show that after the date of the document-confiscation incident, a different deputy worked as bailiff during the remainder of the trial. However, at some

points during trial the bailiff who engaged in the confiscation was apparently present in court (although not working as the bailiff).¹¹

Analysis

On appeal, defendant asserts the bailiff's conduct of confiscating the note that defendant wrote to his counsel during jury selection created a chilling effect on his ability to freely participate in his defense because he was no longer comfortable writing notes to or speaking with his counsel during trial. He argues the case should be dismissed with prejudice to deter the type of flagrant misconduct engaged in by the bailiff.

Alternatively, he contends he should be granted a new trial with directions that the bailiff who engaged in the misconduct be excluded from the proceedings.

To effectuate the constitutional right to effective representation of counsel, communications between a defendant and his counsel are confidential and may not be intruded upon by the government. (*Barber v. Municipal Court* (1979) 24 Cal.3d 742, 750-753.) The defendant's right to effective assistance of counsel under the federal constitution may be violated if the state's intrusion into the attorney-client relationship creates "a realistic possibility of injury to [the defendant] or benefit to the State" (*Weatherford v. Bursey* (1977) 429 U.S. 545, 558; *People v. Alexander* (2010) 49 Cal.4th 846, 888-889.)

In some cases, involving the state's egregious and bad faith interference with attorney-client confidentiality and a demonstrable or serious threat of prejudice to the

¹¹ It is not clear from the record the extent to which the bailiff was in the courtroom after the date of the confiscation incident.

defense, the courts have concluded the remedy of dismissal was warranted. (See, e.g., *Barber v. Municipal Court*, *supra*, 24 Cal.3d at pp. 747, 748, 756-757, 760 [dismissal warranted in case where undercover officer's posing as codefendant in meetings with defense counsel revealed information about defense strategy to prosecution witness, and caused defendants to stop cooperating with defense counsel because of fear of infiltration]; *Morrow v. Superior Court* (1994) 30 Cal.App.4th 1252, 1255, 1258-1263 & fn. 4 [dismissal warranted in case where prosecutor instructed investigator to eavesdrop and report on defendant's attorney-client communication during which confidential matters were discussed].)

On the other hand, the remedy of dismissal should not be considered if the record shows there was no prejudice. (*People v. Alexander*, *supra*, 49 Cal.4th at pp. 891 & fn. 25, 897-899 & fn. 29; *People v. Ervine* (2009) 47 Cal.4th 745, 764-765, 770-771 [dismissal not warranted in case where jail personnel seized defense documents from defendant's jail cell but did not communicate information to prosecution]; *People v. Towler* (1982) 31 Cal.3d 105, 120-122 [dismissal not warranted in case where district attorney seized purported defense-related document from jailed defendant but there was no showing that contents of document aided the prosecution]; see also *United States v. Morrison* (1981) 449 U.S. 361, 365 ["absent demonstrable prejudice, or substantial threat thereof, dismissal of the indictment is plainly inappropriate, even though [government interference with right to counsel] may have been deliberate"]; *People v. Hernandez* (2012) __ Cal.4th __, 2012 Cal. LEXIS 3543 [to obtain reversal based on state

interference with right to counsel, defendant must show prejudice unless there was complete deprivation of meaningful representation].)

Here, even assuming *arguendo* the bailiff's conduct rose to the level of a constitutional violation, the record shows there was no prejudice. There is nothing in the record to suggest that any defense strategy or information was communicated to the prosecution, or that the state acquired any information that could impede the defense or advantage the prosecution. (See *People v. Alexander, supra*, 49 Cal.4th at p. 889; *People v. Ervine, supra*, 47 Cal.4th at p. 770.) We are not persuaded by defendant's claim that he was reluctant to communicate with his counsel during trial because of the confiscation incident. When granting the mistrial motion, the trial court made clear that attorney-client communications were sacrosanct, and although it was "loathe" to declare a mistrial it was sufficiently troubled by the bailiff's conduct to restart the proceedings. The declaration of a mistrial caused significant inconvenience to all involved, and as stated by the trial court it is not a remedy that is lightly imposed. The mistrial required the court to dismiss an entire panel of prospective jurors after voir dire proceedings had already commenced, and to bring in a whole new panel and restart the voir dire proceedings. Further, the court stated that it had discussed the incident with the bailiff and advised him how to properly respond to this type of safety concern.

Defendant was present during these rulings and communications from the court. The record shows the court viewed the bailiff's conduct as a serious misstep that warranted starting the proceedings over and an admonishment to the bailiff. From the court's reaction and the affirmative steps it took to remedy the problem at no small

inconvenience to the judicial process, it is apparent the court would not countenance a "repeat performance" of interference with attorney-client communications. Since it was clear the trial court would not tolerate additional interference by a bailiff, defendant's claim of a chilling effect on his communications with his attorney is not persuasive.

We also reject defendant's contention that the judgment should be reversed and the case remanded for a new trial without the bailiff's presence. First, the bailiff (although at times perhaps present in the courtroom) no longer served as a bailiff at defendant's trial after the date of the confiscation incident. Second, given the affirmative measures taken by the court to ensure there would be no further interference with the attorney-client communications, the record shows defendant's ability to fully and comfortably communicate with his counsel was not impeded by the earlier conduct even if the bailiff remained in court. (See *People v. Wallace* (2008) 44 Cal.4th 1032, 1056-1057.)

To the extent defendant argues the case should be dismissed solely to deter future misconduct, we reject this contention. Although the bailiff's specific response was improper, this is not a case involving bad faith misconduct by the state designed to interfere with the defense of the case. (See *People v. Alexander, supra*, 49 Cal.4th at pp. 890, 895, 897.) Moreover, because the record shows there was no prejudice, there is no basis to consider dismissal as a possible remedy. (*United States v. Morrison, supra*, 449 U.S. at p. 365, fn. 2 [rejecting claim that policy of deterrence alone supports dismissal]; *People v. Alexander, supra*, 49 Cal.4th at pp. 891 & fn. 25, 897-899 & fn. 29; *People v. Ervine, supra*, 47 Cal.4th at pp. 764-765, 770-771; *People v. Towler, supra*, 31 Cal.3d at pp. 120-122.)

III. *Number of Security Officers in Courtroom*

Defendant argues the trial court abused its discretion in overruling his challenge to the number of security officers present in the courtroom during trial.

During pretrial proceedings, there were seven security officers present in the courtroom. Defense counsel objected that there were too many officers. The court responded: "There's always this many correctional officers around. . . . I think there should be. Furthermore, let me note, this is a case that has a potential life sentence, and whenever the stakes are that high, I don't think that two or three more correctional officers . . . is out of line."¹²

A trial court has broad power to maintain courtroom security, and decisions regarding security measures in the courtroom are generally reviewed for abuse of discretion. (*People v. Stevens* (2009) 47 Cal.4th 625, 632.) Some security measures, such as visible shackling of the defendant, carry such a high potential of eroding the presumption of innocence that they require a particularized showing of manifest need to justify their use. (*Id.* at pp. 632-633.) However, the stationing of security officers in the courtroom is not considered inherently prejudicial; accordingly, the use of this security measure need not be justified by a demonstration of extraordinary need. (*Id.* at pp. 633-634; accord, *Holbrook v. Flynn* (1986) 475 U.S. 560, 568-569.)

¹² The court commented that during the pendency of trial one or two of the officers might not be present. The record does not reveal precisely how many officers remained throughout trial.

Use of security officers in the courtroom is subject to review for reasonableness. (See *People v. Stevens*, *supra*, 47 Cal.4th at p. 634; see also *Holbrook v. Flynn*, *supra*, 475 U.S. at pp. 571-572.) As stated in *Stevens*, "[T]he presence of security guards in the courtroom 'is seen by jurors as ordinary and expected.' " (*People v. Stevens*, *supra*, at p. 635.) " 'Our society has become inured to the presence of armed guards in most public places; they are doubtless taken for granted so long as their numbers or weaponry do not suggest particular official concern or alarm.' [Citation.]" (*Ibid.*) However, even though the presence of security officers does not require a heightened showing of manifest need, the trial court "may not defer decisionmaking authority to law enforcement officers, but must exercise its own discretion to determine whether a given security measure is appropriate on a case-by-case basis." (*Id.* at p. 642; *People v. Hernandez* (2011) 51 Cal.4th 733, 742.)

Defendant contends there was no justifiable reason for the use of as many as seven security officers in the courtroom. He asserts the case involved a relatively minor battery charge with no injuries; there was no evidence he was disruptive in court; and he did not pose a high risk of escape because he was nearing his parole date and would have been released from custody if acquitted. Although these were factors the trial court could consider, it was not unreasonable for the court to conclude that seven officers was not an inordinate number in a case involving a potential life sentence. The trial court was not required to find a manifest need for the presence of seven officers, and there is nothing in the record suggesting that the number of officers signaled to the jury that defendant was viewed as a particularly high security risk.

Defendant also argues the trial court failed to make a case-specific determination about the needed number of security personnel and instead improperly delegated this decision to law enforcement. To the contrary, the court specified why it did not find the number of officers to be excessive, stating the number was appropriate given the potential life sentence faced by defendant if convicted.

The record shows no abuse of discretion concerning the number of security officers.

IV. *Exclusion of Evidence About Nearness of Parole Date*

During defendant's testimony, defense counsel asked him if he knew that battery on an officer was a felony; defendant responded "Yes." Defense counsel then asked him if he was nearing his parole date at the time of the incident with Officer Soto. The prosecutor objected on relevancy grounds, and the court sustained the objection. Defense counsel then asked defendant if he was trying to get a "DA referral," and defendant answered, "Absolutely not." When defense counsel asked if he wanted to get out of prison, defendant responded, "Absolutely."

Defendant asserts the trial court abused its discretion in excluding his testimony about the nearness of his parole date. He argues the evidence was relevant to show he had a motive to avoid misconduct so as to not interfere with his release date.

A defendant's constitutional right to a fair trial includes the right to present all relevant evidence of value to the defense case. (*People v. Cunningham* (2001) 25 Cal.4th 926, 999.) Relevant evidence means evidence, including evidence relevant to credibility, that has any tendency to prove or disprove any disputed material fact. (*People v. Boyette*

(2002) 29 Cal.4th 381, 428.) We review the trial court's evidentiary ruling for abuse of discretion. (*People v. Vieira* (2005) 35 Cal.4th 264, 292.)

We agree with defendant that the trial court should have admitted the evidence about the nearness of his parole date because it could reasonably support an inference that he was motivated not to commit any crimes while in prison so he could be released on his scheduled parole date. Because the exclusion of the evidence did not completely deprive defendant of an opportunity to present his defense, we apply the standard for state law error and evaluate whether there is a reasonable probability the outcome would have been more favorable to defendant if the evidence had been admitted. (*People v. Boyette, supra*, 29 Cal.4th at pp. 428-429.)

Defendant argues the exclusion of the evidence was prejudicial because the case was primarily a credibility contest between him and the correctional officers; he was at a disadvantage because jurors would tend to credit a correctional officer over an inmate; and it was crucial that he be permitted to present all evidence supporting his credibility. On this record, we find no prejudice. Although the nearness of his parole date would have supported an inference that he was motivated not to misbehave, the jury heard his testimony that he "[a]bsolutely" wanted to get out of prison and did not want a referral to the district attorney. The jury could readily deduce from this testimony that he was anticipating his release on parole, and thus he had an incentive not to commit any crimes in prison so as not to lengthen his incarceration.

Thus, the jury was effectively apprised of defendant's expectation that he be paroled, and the only thing kept from the jury's consideration was the *nearness* of his

parole date. Although arguably impending parole may make an inmate more acutely aware of the need not to reoffend while in prison, this need and awareness exists throughout the length of an incarceration of an inmate who can be paroled. Even without evidence concerning defendant's parole date, the defense was permitted to show that he fervently wanted to get out of prison, which could support an inference that he was highly motivated not to reoffend. Defendant has not shown a reasonable probability that admission of the parole date evidence would have altered the jury's decision on which version of the incident to credit.

V. Admission of Evidence of Cell Phone Possession

Defendant argues the trial court abused its discretion in overruling his objection to admission of the evidence that the authorities found a cell phone when searching his cell after the battery incident.

During motions in limine, defendant moved to exclude the cell phone evidence, arguing that it was irrelevant and unduly prejudicial because the jury could improperly infer that a person who breaks one prison rule is going to break all prison rules. In opposition, the prosecutor argued that defendant was trying to keep the officers out of his cell until he could dispose of contraband, and his possession of the cell phone (which was contraband) was relevant to show his motive for resisting the officers' orders and striking the officer. The prosecutor cited the evidence that defendant told his cellmate to "[h]ide the shit," and posited, "I don't know if it was the cell phone that he was referring to, but that's relevant information that should come in." The trial court denied the motion,

finding the prosecutor had presented a sufficient basis for the jury to consider the evidence.

Evidence of a defendant's misconduct that is not charged in the current case is generally inadmissible if its only relevance is to show the defendant has a propensity to engage in misconduct. (*People v. Alcala* (1984) 36 Cal.3d 604, 631.) The rationale for excluding uncharged misconduct evidence arises from the danger that the jury will convict merely because of the defendant's propensity for wrongdoing regardless of whether guilt is proven beyond a reasonable doubt. (*Ibid.*) However, uncharged misconduct evidence is admissible when relevant to prove some fact other than criminal propensity, including motive. (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 203.) Because of the dangers associated with uncharged misconduct evidence, the probative value of the evidence must be substantial and not outweighed by the potential for undue prejudice. (*People v. Kipp* (1998) 18 Cal.4th 349, 371.) We review the trial court's evidentiary rulings for abuse of discretion. (*Ibid.*)

Possession of cell phones is prohibited by the prison rules, and defendant's possession of the phone occurred at the same time as the charged battery incident. The trial court reasonably concluded that possession of the prohibited cell phone was relevant to support that defendant's motive in striking the officer was to try to keep the officers out of his cell until the phone could be disposed of by defendant's cellmate.

Defendant argues the trial court should have excluded the cell phone possession evidence because it was unduly prejudicial and cumulative to other evidence of motive. He asserts the evidence was highly inflammatory because the jurors would likely

speculate he was using the cell phone for illicit criminal activities and he had a propensity to break prison rules. Further, there was other evidence of motive, i.e., he told his cellmate to "hide the shit" and he was seen flushing something down the toilet. We are not persuaded. Undue prejudice arises from evidence that uniquely tends to evoke an emotional bias against the defendant or cause prejudgment of the issues based on extraneous factors. (*People v. Doolin* (2009) 45 Cal.4th 390, 439.) Possession of a cell phone is not the type of evidence that creates the risk of an emotional bias that might distract the jurors from their task of determining guilt of the charged offense. Further, the evidence of cell phone possession was not merely cumulative to the evidence of defendant's directive to hide something and his act of flushing; rather, the cell phone possession provided concrete evidence of an item that defendant could have been trying to prevent the officers from discovering.

The court did not abuse its discretion in admitting the evidence.

VI. *Prosecutor's Closing Argument*

Defendant asserts that in two instances during closing argument, the prosecutor misstated facts that were not in evidence, and the misconduct requires reversal.

A prosecutor is given wide latitude to vigorously argue the case as long as the argument is a fair comment on the evidence, which can include reasonable inferences or deductions to be drawn therefrom. (*People v. Hill* (1998) 17 Cal.4th 800, 819.)

However, the prosecutor may not deliberately or mistakenly misstate the evidence. (*Id.* at p. 823.)

We evaluate defendant's two contentions of misconduct during closing argument.

A.

Defendant argues the prosecutor misrepresented the evidence by stating that Aguilar and defendant had chosen to be cellmates. He argues this was an improper attempt to undermine Aguilar's credibility by showing he was biased in favor of defendant.

This argument occurred while the prosecutor was reviewing the various factors that can affect witness credibility, including bias. Concerning Aguilar, the prosecutor stated: "*I don't know what his personal relationship is with the defendant Somehow they agreed to become cellmates.*" (Italics added.) Defense counsel objected that there was no evidence that they had agreed to become cellmates. The trial court responded that it was "almost prepared to sustain the objection," but that the jury should "[s]earch your memories, your notes, or the transcript, if you feel that is critical, and resolve it that way." The prosecutor then argued, "Now I don't believe [Aguilar] was being very forthcoming, but somehow he ended up cellmates with the defendant"13

During trial testimony, when the prosecutor asked Aguilar if he chose defendant as a cellmate, Aguilar responded that he was temporarily moved there "because it was a cell" until he could be moved into a cell with his cousin. Although Aguilar's testimony arguably could support an inference that he did not request defendant as a temporary

13 The prosecutor mistakenly referred to Aguilar by defendant's name (Sanchez), but it is apparent from the context of his statements that he meant Aguilar.

cellmate, Aguilar never affirmatively stated that he did not make this choice.¹⁴ Given the lack of clarity in the record and the wide latitude afforded counsel during closing argument, the prosecutor could reasonably urge the jury to deduce that Aguilar was not being "very forthcoming" about a preexisting relationship with defendant. Likewise, the trial court reasonably told the jury to consult its memories, notes, or transcripts, to decide what the testimony showed on this point. Defendant has not shown prosecutorial misconduct in this regard.

B.

Defendant argues the prosecutor misrepresented the evidence by stating that Officer Thomas had not viewed a forensic photograph depicting pepper spray in defendant's cell. He asserts this was an improper attempt to bolster Officer Thomas's credibility based on the prosecutor's claim that, unbeknownst to Officer Thomas, the location of the spray depicted in the photograph was consistent with Thomas's description of the incident.

¹⁴ The testimony was as follows: "[Prosecutor:] Now, how did you choose Mr. Sanchez as a cellmate?" [¶] . . . [¶] "[Aguilar:] I was just there like most of the block, to move in with my cousin." [¶] . . . [¶] "[Prosecutor:] Is Mr. Sanchez your cousin?" [¶] "[Aguilar:] No, no, I was going to move into my cousin's downstairs." [¶] "[Prosecutor:] Okay. So you were temporarily in that cell because you were going to move in with your cousin?" [¶] "[Aguilar:] Yeah." [¶] . . . [¶] "[Prosecutor:] . . . When you get housed with someone, can you request the type of person you would be housed with; do you get to make requests?" [¶] "[Aguilar:] Yes." [¶] "[Prosecutor:] So how did you choose to be housed with Mr. Sanchez?" [¶] . . . [¶] "[Aguilar:] I just got moved there because it was a cell, you know." Aguilar also testified that he was new to the facility and had been in the cell with defendant for only one day.

When urging the jury to credit the prosecution's version of the incident, the prosecutor stated:

"We heard from Officer Larry Thomas. He testified in the same demonstration about how [defendant] was coming out the door. And remember, although the defendant gets to hear everyone testify, my officers didn't, so they didn't hear each other tell this story, but both of the demonstrations were remarkably similar. He was only a few feet away and had a clear view of [defendant] striking Officer Soto.

"Remember the demonstration about how — and use your own memory about this — how Officer Thomas said he was holding the door and somehow managed to get his OC canister and the defendant was very low and he was able to come from underneath and fire up at the defendant, there's the OC spray at the top of the cell (indicating [photograph]), corroborating his demonstration.

"Now, Larry Thomas has never seen this photograph, but it corroborates everything that he testified to." (Italics added.)

Defense counsel objected that there was no evidence as to whether Officer Thomas had seen the photos. The court stated, "Ladies and gentlemen, again, leaving it up to you, I don't seem to recall that evidence, but it's up to you."

During the defense case, the defense introduced the photographs taken by a correctional officer who was investigating the incident. The photographs showed pepper spray on defendant's cell door by the lock, on top of the cell door, and on a towel hanging on the top bunk inside the cell. During his testimony, Officer Thomas was not asked whether he had seen the forensic photographs. However, on cross-examination defense counsel questioned Officer Thomas about whether any pepper spray went inside the cell,

and Officer Thomas's responses suggested that he had no knowledge of this.¹⁵ From this testimony, the prosecutor could reasonably deduce that Officer Thomas did not see or know about the photographs showing the spray inside the cell because he did not refer to this information when questioned by defense counsel on this point. Again, given the wide latitude to draw inferences from the evidence, there was no misconduct, and the court's response to the objection was appropriate.

VII. *Cumulative Error*

Defendant contends that the cumulative effect of error deprived him of a fair trial. The contention is unavailing. The only error was the exclusion of the evidence concerning the nearness of defendant's parole date. As set forth above, this error was not prejudicial.

VIII. *Pitchess Review*

Defendant requests that we independently review the officer personnel records reviewed by the trial court during an in camera *Pitchess* hearing, to determine if there are records of "prior claims of dishonesty or false reporting by Officer Thomas and

¹⁵ The testimony was as follows: "[Defense counsel:] After the spray hit [Officer Soto] in the face, is that when you took out your OC spray and sprayed into the cell?" [¶] "[Officer Thomas:] Not into the cell. I sprayed directly to [defendant's] face." [¶] "[Defense counsel:] So you didn't get any spray inside the cell?" [¶] "[Officer Thomas:] No." [¶] "[Defense counsel:] And Officer Soto's spray hit the door?" [¶] "[Officer Thomas:] Hit the door." [¶] . . . [¶] "[Defense counsel:] But there's spray inside the cell that wasn't from either of you?" [¶] . . . [¶] Neither one of you sprayed OC spray into the cell; correct?" [¶] . . . [¶] "[Officer Thomas:] When I sprayed, I sprayed directly under, so that spray made direct contact. *I could not see my spray hitting or actually go inside the cell, especially when he's lunging out this way.*" (Italics added.)

dishonesty or use of excessive force by Officer Soto." The Attorney General does not oppose this request.

A defendant is entitled to information from an officer's personnel file regarding complaints of misconduct relevant to the defendant's defense. (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1018-1019, 1024.) Upon a showing of good cause by defendant, the trial court conducts an in camera review of the officer's personnel records to determine whether there is discoverable material. (*Id.* at pp. 1016, 1019.) We review the trial court's ruling for abuse of discretion. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1228.)

On July 26, 2010, the trial court conducted an in camera review of the officers' personnel records, and found the records showed no accusations of dishonesty or excessive use of force. The personnel records reviewed by the trial court have been lodged on appeal under seal, and we have reviewed them.¹⁶ We find no abuse of discretion in the court's ruling on this point.

¹⁶ The in camera *Pitchess* review conducted by the trial court was not recorded by a court reporter; hence, there is no reporter's transcript of the in camera hearing. Defendant requested, and we ordered, that the superior court settle the record of the in camera *Pitchess* hearing. In response, the superior court transmitted the personnel documents reviewed by the trial judge. We also received a letter from the trial judge who conducted the in camera hearing indicating that his ruling on the *Pitchess* motion in open court essentially reflected what occurred during the in camera review. Because we have been provided copies of the actual personnel records reviewed by the trial court, as well as the trial court's ruling on the *Pitchess* motion in open court, the record is sufficient to allow our review of the ruling. However, we remind the superior court that, to facilitate appellate review, in camera *Pitchess* hearings should be recorded and a record made of the documents reviewed by the trial court. (See *People v. Mooc, supra*, 26 Cal.4th at p. 1229.)

As noted by defendant on appeal, when Officer Soto was asked at trial if he had ever been accused of excessive use of force before the incident with defendant, he answered, "Yes," and when asked if he had ever been found by an investigation to have used excessive force, he answered "No." However, the personnel records provided to us contain no complaints of excessive use of force by Officer Soto (other than a complaint filed by defendant concerning the charged incident).¹⁷ Perhaps explaining Officer Soto's testimony on this point, there is a document in his file referencing an allegation of excessive force. This document notifies Officer Soto and other correctional officers that they will be interviewed as witnesses in an investigation concerning an allegation of

¹⁷ There was no need to disclose the existence of defendant's excessive force complaint because, obviously, defendant knew about it. (See *Warrick v. Superior Court*, *supra*, 35 Cal.4th at p. 1019 [*Pitchess* disclosure generally consists of identifying information for complainants or witnesses of officer's misconduct to permit defense investigation of misconduct].)

We note that in addition to requesting disclosure of complaints of dishonesty or excessive force, defendant also requested that the trial court disclose officer statements made to internal affairs investigators regarding the incident in this case. Other than stating this request in his written pleadings, there is nothing in the record indicating that during the *Pitchess* proceedings defendant further pursued the request or asked the court to specifically rule on it. On appeal, defendant does not assert the trial court erred in failing to disclose the officers' statements during the investigation of the complaint filed by defendant. Our independent review of the officers' statements to internal affairs shows their statements were consistent with their trial testimony.

excessive use of force. However, the file reflects that the corresponding investigation does *not* involve a complaint that Officer Soto used excessive force.¹⁸

The record shows no abuse of discretion concerning defendant's request for complaints of excessive force or dishonesty.

IX. Sentencing Error

The Attorney General concedes, and we agree, the trial court should not have imposed a five-year sentencing enhancement for a prior serious felony conviction under section 667, subdivision (a)(1). The enhancement applies only if the current felony conviction is for a statutorily-delineated serious felony, and defendant's offense of battery by a prisoner on a nonprisoner (§ 4501.5) is not included in the list of serious felonies set forth in the statute (§ 1192.7, subd. (c)).

Accordingly, we reverse the judgment as to the sentence and remand for resentencing.

¹⁸ At trial, when asked if he had ever been accused of excessive use of force before the charged incident, Officer Soto qualified his "yes" answer by stating "the situation was a little bit different." The trial court sustained an objection to the answer as nonresponsive. Officer Soto's personnel records reflect that the notice document referencing an allegation of excessive force concerned an investigation of a fight between two inmates. There is no suggestion in the personnel records that Officer Soto was being investigated for excessive use of force.

DISPOSITION

The judgment is affirmed as to the conviction and reversed as to the sentence. The case is remanded for resentencing.

HALLER, Acting P. J.

WE CONCUR:

McDONALD, J.

IRION, J.